United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

NO.76-6159

No. 76-6159

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

HELEN D. KELLEY and JOHN E. KELLEY,

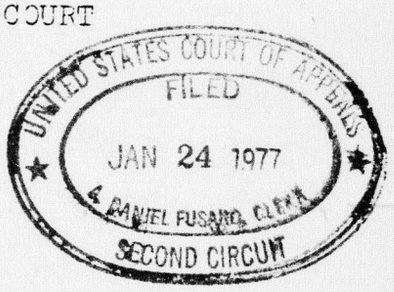
PLAINTIFFS-APPELLEES,

v.

UNITED STATES OF AMERICA
and
RUTH SEMKO,

DEFENDANTS-APPELLANTS.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK



BRIEF FOR THE DEFENDANT-APPELLANT
UNITED STATES OF AMERICA

REX E. LEE,
Assistant Attorney General,

JAMES M. SULLIVAN, JR.,
United States Attorney,

WILLIAM KANTER,
ELOISE E. DAVIES,
Attorneys, Appellate Section,
Civil Division,
Department of Justice,
Washington, D.C. 20530.

Phone: (202) 739-3425.

INDEX

CITATIONS

Cases:

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Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA
and
RUTH SEMKO,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF FOR THE DEFENDANT-APPELLANT UNITED STATES OF AMERICA

QUESTION PRESENTED

Whether the district court lacked jurisdiction in this case due to plaintiffs' failure to file a timely administrative claim as required by the Federal Tort Claims Act, 28 U.S.C. 2401(b) and 28 U.S.C. 2675(a).

STATEMENT OF THE CASE

Plaintiff Helen D. Kelley seeks to recover damages for personal injuries she sustained when she was struck by an automobile owned and operated by Francis A. Hunt,

an employee of the United States Department of Agriculture. Plaintiff John E. Kelley, who is Mrs. Kelley's husband, seeks to recover damages for loss of consortium. The accident occurred on a public highway in Binghamton, New York, on November 8, 1972. This action was commenced in the Supreme Court of New York for Broome County on May 21, 1973, against Mr. Hunt and a co-defendant, Ruth Semko, who was driving another vehicle that was involved in the accident. The case was removed to the United States District Court for the Northern District of New York on February 6, 1975, pursuant to 28 U.S.C. 2679, upon certification of the Attorney General that Mr. Hunt was acting in the scope of his employment at the time of the incident out of which the suit arose. On June 9, 1975, the United States moved to be substituted for Mr. Hunt as a party defendant, pursuant to 28 U.S.C. 2679(d) and to dismiss the action on the ground that the plaintiffs had not filed a timely administrative claim as required by the Federal Tort Claims Act, 28 U.S.C. 2401(b); 28 U.S.C. 2675(a). On September 18, 1975, the district court (per Hon. Lloyd F. MacMahon, J.) granted the motion for substitution but denied the motion to dismiss. The case then proceeded to trial and on July 22, 1976, judgment was entered (per Hon. Edmund Port, J.) against the United States and the defendant Semko for damages of $65,000. The government appeals from that judgment.[1/]

1/ The defendant Semko is not a party to this appeal.

STATEMENT OF THE FACTS

On November 8, 1972, at about 4:30 in the afternoon, Helen D. Kelley was struck by a car owned and operated by Francis A. Hunt as she was walking along a public highway in the town of Binghamton, Broome County, New York. The accident occurred as Mr. Hunt swerved to the right hand shoulder of the road to avoid a head-on collision with a car driven by Ruth Semko. Mrs. Kelley sustained serious injuries for which she was hospitalized (A. 5, 30-31).[2/]

There is considerable disagreement between the parties as to what happened immediately after the accident. Mr. Hunt stated in a letter addressed to the Department of Agriculture that he and his wife went to the hospital the day after the accident to visit Mrs. Kelley, that they met Mr. Kelley at the hospital, and that all four persons discussed the accident and the fact that Mr. Hunt was employed by the Department of Agriculture and had been returning from an assignment when the accident occurred (A. 22, 83). The Department of Agriculture records also indicate that David Ricks, an investigator assigned to the Office of the Inspector General, interviewed Mrs. Kelley about two months after the accident, identified himself, and explained to her the reason for his visit (A.20, 24-25, 83-84). The Department's records

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2/ "A." references are to the separately filed Appendix.

also contain a medical report from the Binghamton General Hospital that Mr. Ricks said he obtained from Mr. Kelley (A. 20, 26-28, 83-84).

However, in an affidavit filed in the proceeding below, Mr. and Mrs. Kelley testified that when they brought suit in the Broome County court on May 21, 1973, they "had no knowledge or information" that Mr. Hunt was a federal employee (A. 71). They also denied that any Department of Agriculture representative had ever approached them with respect to the accident (A. 72).

However, papers filed by counsel for both the plaintiffs and the government in the proceedings relating to the motion to dismiss indicate that all the state court counsel knew of Mr. Hunt's employment, and the possibility that he was acting within the scope of his employment at the time of the accident, by March 5, 1974,[3/] if indeed they had not had prior knowledge. On that date Mr. Hunt's deposition was taken by Donald Kramer, plaintiffs' counsel, in the presence of Theodore Sommer, attorney for the Travelers Insurance Company who was representing Mr. Hunt, and Robert Powers, attorney for co-defendant Ruth Semko. Mr. Hunt was asked by Mr. Kramer what his occupation was and he replied that he was a meat inspector. Mr. Kramer then asked: "For the

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3/ This was approximately ten months after suit was filed in the Broome County court on May 21, 1973, and approximately sixteen months after the accident which occurred on November 8, 1972.

United States Government?" and Mr. Hunt replied "USDA". Mr. Kramer went on to ask" "Were you working that day?" Mr. Hunt answered "Yes". Mr. Kramer asked where Mr. Hunt had been prior to the accident, and Mr. Hunt replied "[I]n Friendsville, Pennsylvania". Mr. Kramer asked: "At the time of the accident, what was your destination; where were you going?" Mr. Hunt replied: "My residence".[4/]

Plaintiffs' counsel Donald Kramer, in an affidavit prepared for the district court in opposition to the government's motion to dismiss, stated:

> Examination Before Trial of Francis A. Hunt was held on the 5th of March, 1974, and in the course of that examination, Mr. Hunt testified in substance that he was employed by the Department of Agriculture and he had been working at Friendsville in the State of Pennsylvania, that he had left work about 4:00 and that [at] the time of the accident was on his way to his residence in Binghamton. [A. 76.]

The Office of General Counsel of the Department of Agriculture was first apprised of the pendency of the action in the Broome County court on December 9, 1974. At that time Mr. Sommer, attorney for the Travelers Insurance Company, advised the Office that Mr. Hunt was faced with a suit for damages which he believed fell within 28 U.S.C. 2679(b) (A. 19; 67-68). The United States Attorney for the Northern District of

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4/ See Government's "Reply Brief in Support of Motion" (A. 82-82) filed with the district court prior to Judge MacMahon's ruling of September 18, 1975, declining to dismiss the action.

New York was simultaneously notified by Mr. Sommer (A. 67-68) as was plaintiffs' counsel (A. 65).

On January 29, 1975, the United States Attorney certified that Mr. Hunt was an employee of the United States and was acting within the scope of his employment at the time of the incident out of which the state court action arose, pursuant to 28 U.S.C. 2679(d) (A. 13). On February 6, 1975 the action was removed to the United States District Court for the Northern District of New York (A. 2). On April 7, 1975 the plaintiffs were asked to admit that no administrative claim had been filed with the Department of Agriculture with respect to the accident (A. 2, 13). Plaintiffs thereafter filed an administrative claim on May 1, 1975, which was denied on May 14, 1975 as untimely filed under 28 U.S.C. 2401(b) (A. 9). On June 9, 1975, the United States moved to be substituted as the party defendant pursuant to 28 U.S.C. 2679(d) and to dismiss the action as barred by 28 U.S.C. 2675(a) and 28 U.S.C. 2401(b) for the plaintiffs' failure to file a timely administrative claim (A. 13).

On September 18, 1975, the district court granted the government's motion for substitution but denied the government's motion to dismiss (A. 92, 97). The district court recognized that pursuant to 28 U.S.C. 1346(b) and 2679(b) "the plaintiffs' sole and exclusive remedy is against the United States and not against the individual employee" (A. 92). Nonetheless the court refused to dismiss the action on the ground that "a dismissal

would result in an injustice" (A. 95). The court reasoned:

> Plaintiffs would be forever barred from asserting this claim for relief because they failed to file administrative claims within two years of the accident. However, this failure was not the fault of the plaintiffs, as they had no indication that Hunt was a government employee acting within the scope of his employment, but the fault of Hunt or his superiors for failing to follow the prescriptions of 28 U.S.C. §2679(c).
>
> It appears that plaintiffs have at all times diligently prosecuted this suit. There was no delay in the bringing of the action in state court against the only persons who, to the best of plaintiffs' knowledge, might bear legal responsibility. Plaintiffs were not informed during the twenty months this suit was pending in the New York court that the United States, and not Hunt, was the proper party defendant. Hunt was under a statutory duty to report this suit to his superiors (28 U.S.C. §2679(c)), and the Government was under a duty to investigate the matter and promptly certify that Hunt was acting within the scope of his employment. Any undue delay in this process cannot operate to the benefit of the Government and to the prejudice of the plaintiffs. Surely the Government by its own inexcusable delay, if not sharp practice, should not be permitted to lull the plaintiff into a false sense of security by waiting for the time to expire for the filing of an administrative claim before moving to be substituted as a defendant in the state action, removing it to a federal court and then moving to dismiss. [A. 95-96.]

The court concluded:

> While it is true that the United States is immune from suit except to the extent that it has waived immunity,

> and that it may impose conditions for bringing actions against it, we do not believe that the Government may manipulate the conditions to deny plaintiffs their day in Court to seek redress for their injuries. [A. 97.] 5/

This appeal is taken from the final order entered by Judge Port, awarding damages of $65,000 in favor of the plaintiffs (A. 99).[6]

5/ The district court also opined that this case was not controlled by any of the cases cited by the government pertaining to the filing of administrative claims--e.g., Meeker v. United States, 435 F. 2d 1219 (C.A. 8, 1970); Bialowas v. United States, 443 F. 2d 1047 (C.A. 3, 1971); and Avril v. United States, 461 F. 2d 1090 (C.A. 9, 1972)--because none of those cases held that "a plaintiff, who acted in good faith in bringing suit against a government employee, might lose his remedy due to a protracted, and perhaps a calculated, delay by the United States in fulfilling its obligations under the Tort Claims Act" (A. 96).

6/ The court had certified its order denying the government's motion to dismiss for immediate appeal pursuant to 28 U.S.C. 1292(b)(A. 98). However, the government did not pursue an interlocutory appeal to this Circuit, since we did not believe that all of the conditions of Section 1292(b) were met.

STATUTES INVOLVED

28 U.S.C. 1346(b) provides:

> Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act of omission occurred.

28 U.S.C. 2401(b) provides:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is brought within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

28 U.S.C. 2675(a) provides:

> An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have

been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

28 U.S.C. 2679 provides:

(b) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property or personal injury or death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee of his estate whose act or omission gave rise to the claim.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such a person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d) Upon a certification by the Attorney General that the defendant employee was acting within the scope of his employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place wherein it is pending and the proceedings deemed a tort action brought against the United States under the provisions of this title and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (b) of this section is not available against the United States, the case shall be remanded to the State court.

ARGUMENT

THE DISTRICT COURT LACKED JURISDICTION OVER THIS ACTION BECAUSE OF THE PLAINTIFFS' FAILURE TO FILE A TIMELY ADMINISTRATIVE CLAIM.

Introduction and Summary

We show below that the district court was without jurisdiction in this case because, as the court itself initially recognized, the government is immune from suit except as it consents to be sued and, "the terms of this consent to be sued in any court define that court's jurisdiction to entertain the suit". United States v. Sherwood, 312 U.S. 584, 586; Soriano v. United States, 325 U.S. 270, 276. The United States cannot be sued in a district court under the Act unless a written claim is submitted to the appropriate federal agency within two years after the cause of action accrues. 28 U.S.C. 2401(b); 28 U.S.C. 2675(a).[7/] The administrative claim requirement is jurisdictional. Meeker v. United States, supra, 435 F. 2d

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7/ It is not disputed here that the remedy against the United States under the Federal Tort Claims Act is exclusive of any other remedy for personal injuries resulting from the negligent operation by a government employee of a motor vehicle in the scope of his employment. 28 U.S.C. 2679(b). Perez v. United States, 218 F. Supp. 571 (S.D. N.Y., 1963); Hoch v. Carter, 242 F. Supp. 863 (S.D. N.Y., 1965); Noga v. United States, 411 F. 2d 943 (C.A. 9, 1961), certiorari denied, 396 U.S. 841; Carr v. United States, 422 F. 2d 1007 (C.A. 4, 1970).

1219 (C.A. 8, 1970); Bialowas v. United States, supra, 443 F. 2d 1047 (C.A. 3, 1971); Avril v. United States, supra, 461 F. 2d 1090 (C.A. 9, 1972); Melo v. United States, 505 F. 2d 1026 (C.A. 8, 1974).

Since the filing of a timely administrative claim is a condition imposed upon the United States' consent to be sued, courts are not at liberty to dispense with the requirement by finding waiver or equitable estoppel. This Court has but recently reaffirmed the settled principle that estoppel cannot be invoked against the federal government based upon the acts of its agents. See Goldberg v. Weinberger, ___ F. 2d ___, C.A. 2, No. 76-6078, decided December 1, 1976, Slip opinion, p. 728,[8/] citing Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947). The district court in the instant case therefore could not acquire jurisdiction to award a judgment against the United States by virtue of the alleged "calculated delay" or "sharp practice", of government agents, even assuming arguendo that the record showed such "calculated delay" or "sharp practice" which it does not.

Moreover, the record does not support the court's assumption that the plaintiffs' failure to file a timely administrative claim was entirely due to the omission of government employees. It shows rather that plaintiffs' counsel had notice of Mr. Hunt's employment and the circumstances

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8/ Since this opinion has not yet been published, the slip opinion is reproduced in the Addendum to this brief for the Court's convenience.

surrounding the accident within sixteen months after the claim accrued, and thus had eight months in which to file an administrative claim before the action was removed to the district court.

Finally, we point out that this suit is not so unique as the district court believed it to be. We are aware of at least one reported case, Baker v. United States, 341 F. Supp. 494 (D. Md., 1972), affirmed per curiam, C.A. 4, No. 72-1708, decided November 30, 1974,[9] and three unreported district court opinions[10] essentially on all fours with it. In all of these cases plaintiffs lost their opportunity to assert their claim against the United States, after actions were removed from state courts, because of their failure to comply with the administrative claim requirement.

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1. The plaintiffs have not questioned the fact that this action was properly certified by the Attorney General (through the United States Attorney for the Northern District of New York) as one involving the alleged negligent operation of a motor vehicle operated by a government employee acting in the scope of his employment and properly removed to the federal district court pursuant to 28 U.S.C. 2679(b). Thereafter under 28 U.S.C.

9/ The court of appeals opinion in Baker v. United States is reproduced at p. 8a.

10/ These cases are Kangas v. United States, D. Minn., Civil No. 2-75-Civ-34, August 8, 1975, p. 11a; Elter v. United States, W.D. Pa., Civil No. 74-526, September 26, 1974, p. 16a; and Grix v. United States, E.D. Mich., Civil No. 74-72550, January 14, 1975, p. 21a.

2679(b) the plaintiffs' exclusive remedy was against the United States under the Federal Tort Claims Act, 28 U.S.C. 1346(b) and governed by 28 U.S.C. 2401(b) and 2675(a).

Section 2675(a) pertinently provides that:

> An action shall not be instituted upon a claim against the United States for money damages for . . . personal injury . . . caused by the negligent or wrongful act or omission of any employee of the government acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate federal agency and his claim shall have finally been denied by the agency. . . .

Section 2401(b) pertinently provides:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues. . . .

In Bialowas v. United States, 443 F. 2d 1047, 1048, the Third Circuit held that the filing of a proper administrative claim is an absolute prerequisite to a tort suit against the United States because:

> As a sovereign, the United States is immune from suit save as it consents to be sued. The terms of its consent to be sued in any court define the court's jurisdiction to entertain the suit. United States v. Sherwood, 312 U.S. 584 . . . Although the Federal Tort Claims Act allows suits against the Government for torts committed by its employees while in the scope of their employment, it specifically requires an initial presentation of the claim to the appropriate federal agency and a final denial by that agency as a prerequisite to suit under the Act. This requirement is jurisdictional and cannot be waived.

Accord Meeker v. United States, supra, 435 F. 2d 1219 (C.A. 8, 1970); Ianni v. United States, 457 F. 2d 804 (C.A. 6, 1972); Avril v. United States, supra, 461 F. 2d 1090 (C.A. 9, 1972); Best Bearings v. United States, 463 F. 2d 1177 (C.A. 7, 1972); Melo v. United States, supra, 505 F. 2d 1026 (C.A. 8, 1974).

The court below properly recognized the principle of sovereign immunity that is involved here but nonetheless declined to hold that the filing of a timely administrative claim was an absolute prerequisite to the suit. Although the court's reasoning is not entirely clear to us, it is plain that what the court actually did was to apply the doctrine of equitable estoppel against the government.[11/] The court would not bar the plaintiffs from pursuing their claim because they had "at all times diligently prosecuted this suit" while Hunt and his superiors "fail[ed] to follow the prescriptions of 28 U.S.C. 2679(c)" (A. 95).

While it is true that Mr. Hunt did not carry out the reporting duties prescribed by subsection 2679(c),

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11/ The court purported to find authority to do so in the legislative history of the Federal Tort Claims Act, noting that the purpose of the Act was to provide "more fair and equitable treatment of private individuals and claimants when they deal with the Government or are involved in litigation with their Government" (A. 94). However, this legislative history can afford no basis for the court's disregard of the jurisdictional prerequisites that are spelled out in the statute itself.

Mr. Hunt's omission [12/] plainly did not obviate the requirement for filing an administrative claim nor estop the government from asserting the court's lack of jurisdiction to award damages to the plaintiffs. It has long been settled that the United States is not normally subject to estoppel by the acts or omissions of its agents. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 384 (1947); United States v. Ulvedal, 372 F. 2d 31, 35 (C.A. 7, 1967) (per then Circuit Judge Blackmun). Indeed this Court has recently reaffirmed this principle, stating:

> The government could scarcely function if it were bound by its employees unauthorized representations. [Slip opinion, p. 729; Add., p. 7a.]

The result would be no less drastic were the government held bound by its employees' failure to follow prescribed procedures, as the court held it to be in the instant case. Moreover, the courts of appeals have expressly held that neither the administrative claim requirement nor the two year limitation of the Federal Tort Claims Act is subject to waiver or estoppel. See Best Bearings Co. v. United States, supra, 463 F. 2d 1177, 1179 (C.A. 7, 1972); Powers v. United States, 390 F. 2d 602, 604 (C.A. 9, 1968).

12/ The omission occurred through ignorance of the law rather than deliberate calculation according to Mr. Hunt's letter addressed to the Department of Agriculture when the omission was discovered (A. 22).

Furthermore, the court's opinion is misleading in the extreme to the extent that it implies that the sole reason for the plaintiffs to find themselves out of court was the employee Hunt's omissions. Plainly the plaintiffs could have met the two year limitation for filing an administrative claim had they taken appropriate steps to do so after learning on March 5, 1974, when Mr. Hunt's deposition was taken, that he was employed as a meat inspector for the United States Department of Agriculture and was returning home from a work assignment in Friendsville, Pennsylvania, when the accident from which this suit arose occurred. Plaintiffs' counsel admits that he was aware of the salient facts (A. 76). The inescapable conclusion therefore is that he was not aware of the law involved when he proceeded for another nine months to pursue a remedy against Hunt in the state court rather than the statutory remedy against the United States provided by 28 U.S.C. 2679(b).

Insofar as the court below suggests that the government "manipulat[ed] . . . conditions to deny plaintiffs their day in court", or by its "inexcusable delay if not sharp practice lull[ed] the plaintiff into a false sense of security by waiting for the time to expire for the filing of an administrative claim before moving to be substituted as a defendant" (A. 95-96), we respectfully take issue with its holding as unsupported by the evidence. The record in this case shows no "manipulations" by the government during the state court

litigation nor any "sharp practice". We object on the same grounds to the court's characterization of this case as one in which "a plaintiff, who acted in good faith in bringing suit against a government employee, might lose his remedy due to a protracted, and perhaps a calculated, delay by the United States in fulfilling its obligations under the Tort Claims Act" (A. 96-97).

Having characterized the action in this way, the court found it could find no cases on all fours with it (A. 96) and thus believed this to be a case of first impression suitable for immediate appeal (A. 98). We must admit that we are also unaware of any cases in which the government deliberately misled plaintiffs to their detriment into pursuing a state court remedy until the two year Tort Claims Act limitation had expired, if indeed such cases exist. However, if this case is properly characterized as one in which plaintiffs' inadvertence or ignorance of the law led to noncompliance with the administrative claim requirement, there are numerous cases in point. One which immediately comes to mind is Baker v. United States, supra, 341 F. Supp. 494 (D. Md., 1972), affirmed per curiam, C.A. 4, No. 72-1708, November 30, 1972.[13/] That case arose out of a three car collision involving a United States Coast Guard officer who had been recently commissioned in Yorktown, Virginia, and

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13/ The Fourth Circuit's opinion is reproduced in the Addendum at p. 8a.

was proceeding in his own car in civilian clothes to his duty assignment aboard a vessel at Boston, Massachusetts. The accident occurred in Maryland, and suit was filed in a Maryland court shortly before the expiration of the applicable three year statute of limitation. The action was subsequently removed to the federal district court pursuant to 28 U.S.C. 2679(b), upon certification that the officer was acting within the scope of his employment, and was dismissed by the district court as time barred by 28 U.S.C. 2401(b). The court of appeals dispensed with oral argument and affirmed the district court's judgment per curiam (Add., p. 10a).

Three unreported district court decisions which are also in point have been included in the Addendum. In Kangas v. United States, supra (D. Minn., Civil No. 2-75-Civ-34, August 8, 1975), Chief Judge Devitt declined to apply the doctrine of equitable estoppel to excuse plaintiff's noncompliance with the "explicit, mandatory, and unambiguous" requirement for filing an administrative claim (Add., p. 15a). In Elter v. United States, supra (W.D. Pa., Civil No. 74-526, September 26, 1974), the court granted the government's motion to dismiss for the plaintiff's failure to file an administrative claim although the plaintiff alleged that he "had no knowledge or reason to know that [the federal employee] was a federal employee acting within the scope of her employment at the time of the accident" (Add., pp. 19a-20a).

In Grix v. United States, supra (E.D. Mich., Civil No. 74-72550, January 14, 1975), the court granted the government's motion to dismiss for the plaintiff's failure to file a proper administrative claim, despite "the lack of knowledge of the plaintiff of the liability of the Government" (Add., p. 22a). There are probably many more district court decisions in point which have not been noted because the law in this area is so well settled.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

REX E. LEE,
Assistant Attorney General.

JAMES M. SULLIVAN, JR.,
United States Attorney.

WILLIAM KANTER,
ELOISE E. DAVIES,
Attorneys, Appellate Section,
Civil Division,
Department of Justice,
Washington, D.C. 20530,

Phone: (202) 739-3425.

JANUARY, 1977.

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of January, 1977, I served the foregoing brief upon counsel for all parties by causing copies to be mailed, postage prepaid, to:

Donald W. Kramer, Esquire
Kramer, Wales & McAvoy
59-61 Court Street
Binghamton, New York 13902

Robert C. Powers, Esquire
46 Vestal Avenue
Binghamton, New York 13903

Eloise E Davies

ELOISE E. DAVIES
Attorney.

A D D E N D U M

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 178—September Term, 1976.

(Argued October 19, 1976 Decided December 1, 1976.)

Docket No. 76-6078

LILLIAN GOLDBERG,

Appellant,

v.

CASPAR WEINBERGER, Secretary of Health, Education and Welfare,

Appellee.

Before:

HAYS, ANDERSON and GURFEIN,

Circuit Judges.

Appeal from an order of the United States District Court for the Eastern District of New York, Thomas C. Platt, *Judge*, which sustained appellee's decision that appellant is not entitled to widow's insurance benefits, and dismissed the complaint.

Affirmed.

DAVID S. PREMINGER, New York, N.Y. and JOHN C. GRAY, JR., New York, N.Y., *for Appellant.*

DAVID C. TRAGER, United States Attorney, New York, N.Y. (Josephine Y. King and Richard

P. Caro, Assistant United States Attorneys, of counsel), *for Appellee*.

HAYS, *Circuit Judge:*

Prior to July, 1972, plaintiff-appellant Lillian Goldberg had been receiving widow's disability benefits pursuant to section 202(e)(1)(B)(ii) of the Social Security Act, 42 U.S.C. § 402(e)(1)(B)(ii)(1970 ed.) ["the Act"].[1] On May 21, 1972, about two months before her sixtieth birthday, plaintiff remarried, thereby disqualifying herself from receiving any more widow's disability insurance benefits or widow's insurance benefits under the Act.[2] Accordingly, in

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1 Section 202(e)(1) provides, in pertinent part:

"(e) Widow's insurance benefits.

(1) The widow (as defined in section 416(c) of this title) and every surviving divorced wife (as defined in section 416(d) of this title) of an individual who died a fully insured individual, if such widow or such surviving divorced wife—

(A) is not married, [and]

(B)(i) has attained age 60, or (ii) has attained age 50 but has not attained age 60 and is under a disability (as defined in section 423(d) of this title) which began before the end of the period specified in paragraph (5),

* * *

shall be entitled to a widow's insurance benefit for each month . . ."

42 U.S.C. § 402(e)(1) (1970 ed.).

2 Had plaintiff waited until after her sixtieth birthday to remarry, she would have remained eligible to receive continued, albeit reduced, benefits. Thus, section 202(e)(4) of the Act provides:

"If a widow, after attaining the age of 60, marries . . ., such marriage shall, for purposes of paragraph (1) of this subsection, be deemed not to have occurred; except that . . . such widow's insurance benefit for the month in which such marriage occurs and each month thereafter prior to the month in which the husband dies or such marriage is otherwise terminated, shall be equal to one-half of the primary insurance amount of the deceased in-

July of 1972 plaintiff's benefits were terminated by the Social Security Administration, which affirmed its decision in a Reconsideration Determination dated November 7, 1972. This decision was upheld, in turn, by an Administrative Law Judge and the Appeals Council of the Social Security Administration. On review in the United States District Court for the Eastern District of New York, Judge Platt sustained the Secretary's decision, and granted the government's motion for summary judgment.

Plaintiff now appeals to this court, attacking the decision of the district court on two grounds: First, she claims that as a result of information given her by her local Social Security office prior to her remarriage, to the effect that marriage would reduce but not eliminate the benefits, the government is estopped from finding her ineligible for benefits. Second, and in the alternative, she argues that the relevant statutory provisions arbitrarily discriminate on the basis of marital status and age, in violation of the equal protection and due process clauses. Because we find both of these contentions to be without merit, we affirm the district court's decision.

I.

The Social Security Act, insofar as it is relevant to this controversy, provides as follows: section 202(e)(1) grants benefits to widows who are (A) unmarried, *and* (B) *either* (i) over the age of 60 *or* (ii) over the age of 50 and disabled. *See* 42 U.S.C. § 402(e)(1)(1970 ed.), note 1, *supra*. Section 202(e)(4) provides that if a widow remarries *after* attaining the age of 60, the marriage will be

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dividual on whose wages and self-employment income such benefit is based."

42 U.S.C. § 402(e)(4) (1970 ed.).

In actual fact, plaintiff's disability benefits were continued for two months, due to a delay in administrative processing. She was allowed to retain the overpayments because she was without fault in their receipt.

disregarded, except that her benefits will be reduced. *See* 42 U.S.C. § 402(e)(4) (1970 ed.), note 2, *supra*. A widow who remarries *before* attaining the age of 60, however, is simply no longer "not married" within the meaning of section 202(e)(1)(A). Thus, if a disabled widow remarries before she reaches 60, her benefits are terminated because she does not satisfy the requirements of either 202(e)(1) or 202(e)(4); if the disabled widow waits until after she is 60 to remarry, she continues to receive reduced benefits.

Plaintiff attacks this statutory scheme on the ground that it deprives her of her rights to due process and equal protection of the law by impermissibly discriminating on the basis of marital status and age.[3] We disagree.

The Act admittedly draws a sharp line between widows who remarry before age 60 and those who wait until after their sixtieth birthday to remarry. Nevertheless, we cannot overturn this classification unless we find that it bears no rational relationship to a valid Congressional purpose.[4]

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3 We agree with the district court that plaintiff lacks standing to challenge the statutory scheme insofar as it mandates termination of *disability* benefits upon remarriage by a widow under the age of 60. Since plaintiff's disability benefits continued after her marriage until her sixtieth birthday, *see* note 2 *supra*, she received all such benefits to which she would have been entitled even had she not remarried. *See* Social Security Act § 202(e)(1)(B)(ii), 42 U.S.C. § 402(e)(1)(B)(ii) (1970 ed.). She therefore has not suffered the requisite personal injury to object to the provision for termination of disability benefits upon remarriage. *See generally Evans* v. *Hills*, No. 74-1793 (2d Cir. June 4, 1976) (*en banc*).

4 We reject appellant's suggestion, based on the Supreme Court's decisions in *Loving* v. *Virginia*, 388 U.S. 1 (1967), *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942), and *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), that the statute be examined under a standard of strict scrutiny. She argues that the Act infringes on a fundamental right, namely the right to marry, by requiring as a condition to securing benefits that a widow remain unmarried until her sixtieth birthday.

In *Loving* v. *Virginia*, *supra*, the Court described the freedom to marry as "one of the vital personal rights essential to the orderly pursuit of happiness by free men." 388 U.S. at 12. However, the Virginia stat-

Originally, the Act provided that a widow who remarried was disqualified from receiving any insurance benefits. In 1965 Congress added section 202(e)(4), providing for a reduction rather than a total elimination of benefits to widows remarrying over the age of 60. Act of July 30, 1965, Pub. L. No. 89—97, § 333(a), 79 Stat. 286, 403-04. Congress could have decided to extend reduced benefits to widows who remarry at *any* age, but it chose to draw the line at age 60.

As the district court reasoned, Congress may well have concluded that a widow who remarries during her 50's is more likely to marry a man having several years earning capacity than is a widow 60 or older. Alternatively, Congress may have decided that practical considerations of administration require that there be an objective, somewhat arbitrary criterion for determining benefit eligibility. *See, e.g., Matthews* v. *Lucas*, 96 S. Ct. 2755, 2764-67 (1976); *Weinberger* v. *Salfi*, 422 U.S. 749, 781-85 (1975); *Dan-*

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utory scheme there invalidated *prevented* marriages between persons solely on the basis of *race;* neither a total bar to marriage nor an invidious racial classification is involved in this case. Moreover, *Loving* did not hold that the right to marry is "fundamental," as that term is understood in an equal protection context.

Skinner v. *Oklahoma, supra,* is not to the contrary. Despite *dictum* to the effect that "[*m*]*arriage and procreation* are fundamental to the very existence and survival of the race," 316 U.S. at 541 (emphasis added), *Skinner* held only that "strict scrutiny of the classification which a State makes in a *sterilization law* is essential . . ." *Id.* (emphasis added). Again the court did not hold that any classification which burdens the right to marry must be examined with strict scrutiny.

Nor does *Griswold* v. *Connecticut, supra,* support plaintiff's argument. There the Court was concerned with "the notions of privacy surrounding the marriage relationship," 381 U.S. at 486, not with the right to marry.

In any event, eligibility for benefits may be dependent upon marital or familial relationships without violating the constitution. *See, e.g., Weinberger* v. *Salfi*, 422 U.S. 749, 777-85 (1975); *Kahn* v. *Shevin*, 416 U.S. 351, 353-56 (1974). We therefore agree with appellee that the crux of plaintiff's constitutional objection is that the statute unconstitutionally discriminates on the basis of *age.*

dridge v. *Williams*, 397 U.S. 471, 485 (1970). In either case, we cannot say that Congress acted unreasonably in denying benefits to widows who remarry before reaching 60 years of age.

We hold that the Act does not discriminate among benefit claimants on the basis of criteria which bear no rational relationship to a legitimate congressional purpose. It follows that plaintiff's constitutional argument is without merit.

II.

Plaintiff also argues that the government is estopped from terminating her benefits because of a misrepresentation by a local Social Security Office employee, to the effect that remarriage before attaining age 60 would reduce but not terminate her benefits.

The government does not dispute plaintiff's claim that she received misinformation and relied on it to her detriment. Rather, the government argues that plaintiff may not invoke the doctrine of estoppel in this case.

It is well established that "estoppel cannot be set up against the Government on the basis of an unauthorized representation or act of an officer or employee who is without authority in his individual capacity to bind the Government." *Byrne Organization, Inc.* v. *United States*, 287 F.2d 582, 587 (Ct. Cl. 1961). *See also Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380 (1947). Although at least one court has evinced a willingness to depart from this principle in certain circumstances, *see, e.g., United States* v. *Wharton*, 514 F.2d 406, 412-13 (9th Cir. 1975); *Fox* v. *Morton*, 505 F.2d 254, 256 (9th Cir. 1974); *United States* v. *Lazy F C Ranch*, 481 F.2d 985, 988 (9th Cir. 1973); *Brandt* v. *Hickel*, 427 F.2d 53 (9th Cir. 1970); *Schuster* v. *C.I.R.*, 312 F.2d 311 (9th Cir. 1962), we decline to do so here.

The government could scarcely function if it were bound by its employees' unauthorized representations. Where a party claims entitlement to benefits under federal statutes and lawfully promulgated regulations, that party must satisfy the requirements imposed by Congress. Even detrimental reliance on misinformation obtained from a seemingly authorized government agent will not excuse a failure to qualify for the benefits under the relevant statutes and regulations.[5]

Thus, since it is clear that the local employee of the Social Security Administration was not authorized to represent to plaintiff that she would continue to receive reduced benefits after her marriage, the government is not estopped from denying her widow's insurance benefits.

Accordingly, the judgment of the district court is affirmed.

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5 Our decision in *Corniel-Rodriguez* v. *I.N.S.*, 532 F.2d 301 (2d Cir. 1976), is not to the contrary. We held there that estoppel may be invoked against the government where there is "noncompliance with an affirmatively required procedure. . . ." 532 F.2d at 306-07. We took pains, however, to limit our decision to the specific facts of that case, particularly the fact that the government employee had failed to provide petitioner with a warning *mandated* by federal regulations. *Id.* and n.18. No such regulation governs Social Security Office employees.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 72-1708

Paul C. Baker and
Richard Kohlhepp,

Appellants,

-versus-

United States of America,

Appellee.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Roszel C. Thomsen, District Judge.

Decided November 30, 1972.

Before HAYNSWORTH, Chief Judge, RUSSELL, and FIELD, Circuit Judges.

Joseph Leiter and Michael J. Doxzen on brief for Appellants; Harlington Wood, Jr., Assistant Attorney General, George Beall, United States Attorney, Morton Hollander, and Eloise E. Davies, Attorneys, Department of Justice, on brief for Appellee.

PER CURIAM:

On June 15, 1965, the appellants, Paul C. Baker and Richard Kohlhepp, were involved in an automobile accident with one Walter N. Smith. At the time of the accident Smith was an officer in the United States Coast Guard, and he was traveling under military orders from Yorktown, Virginia, to Boston, Massachusetts. In June, 1968, shortly before the Maryland three-year limitation period expired, Baker and Kohlhepp filed suit against Smith in the Baltimore City Court. On November 30, 1970, the cases were removed to the District Court pursuant to Sections (b)-(d) of the Government Drivers Act, 28 U.S.C., and the United States was substituted as defendant in place of Smith. After removal the parties stipulated that at the time of the accident Smith was a federal employee, acting within the scope of his employment. Then on motion of the Government the actions were dismissed because the suits were not filed within the two-year limitation period provided by 28 U.S.C. §2401. This appeal followed.

Appellants argue that the two-year limitation period began to run when they discovered on October 27, 1970, that Smith was acting within the scope of his employment. We are unpersuaded by this argument. 28 U.S.C. §2401(b)

provides that: "A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues-....-" Federal law determines when a claim "accrues" within the meaning of §2401 and it has been held that the two-year limitation period begins to run when an injury is sustained as a result of a negligent act and some damage is discernible. Mendiola v. United States (5th Cir. 1968) 401 F. 2d 695. In the present case the accident and injury occurred on June 15, 1965, and the claim accrued as of that date.

Accordingly, we dispense with oral argument and affirm the judgment below.

AFFIRMED.

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
SECOND DIVISION

SULO E. KANGAS,

Plaintiff,

vs.

UNITED STATES OF AMERICA
and ARMIN REINARD STEINHAUS,

Defendants.

2-75-Civ-34

MEMORANDUM & ORDER

STANLEY E. KARON, Robins, Davis & Lyons, St. Paul, Minnesota, attorney for plaintiff.

ROBERT G. RENNER, United States Attorney and JOHN M. LEE, Assistant United States Attorney, Minneapolis, Minnesota, attorneys for defendant United States.

This matter is before the court on the motion of the United States for summary judgment or, in the alternative, for dismissal.

On November 15, 1972, plaintiff was injured when his car was involved in a collision with another automobile driven by Armin Reinard Steinhaus. This action was commenced at the state court level by service of summons and complaint upon Steinhaus on or about November 15, 1974. Upon motion of the United States Attorney, invoking 28 U.S.C. § 2679(d) and certifying that the alleged accident occurred while Steinhaus was acting within his employment as a postal employee of the Government, the case was removed to this court and has been deemed a tort action brought against the United States under the Federal Tort Claims Act.

The effect of 28 U.S.C. §§ 1346 and 2679 is to protect individual federal employees from personal tort

liability by making suit against the United States under the Federal Tort Claims Act, the exclusive remedy for damages sustained as a result of negligent operation of a motor vehicle by a federal employee acting in the course of his employment. Noga v. United States, 411 F.2d 943 (9th Cir.), cert. denied, 396 U.S. 841 (1969); see generally Annot., 16 A.L.R.3d 1394 (1967). Section 2675(a) of 28 U.S.C. requires exhaustion of appropriate administrative remedies prior to the institution of any action against the United States for damages resulting from the negligence of a government employee acting within the scope of his employment. In addition, such a tort claim is "barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues. . . ." 28 U.S.C. § 2401(b).

The basis of the Government's motion is that this court lacks jurisdiction by reason of plaintiff's failure to exhaust administrative remedies as required by 28 U.S.C. § 2675(a), and additionally that the claim is barred by the two-year statute of limitations provided in 28 U.S.C. § 2401(b).

Plaintiff first argues that the doctrine of equitable estoppel should be applied against the Government in this case. Plaintiff asserts that his failure to file a claim as required was "premised upon" representations made by a postal inspector that any claim filed against the Government would be in the form of excess coverage beyond that provided by the negligent party's insurance.[1] Plaintiff's attorney concluded that the filing of an administrative claim was not necessary.

It has been regularly held that the presentation of an administrative claim is a jurisdictional requirement not

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1. In many instances, where an action has been brought under the Federal Tort Claims Act, the Government does have a right of reimbursement against the negligent party's insurance company. See, e.g., McCrary v. United States, 235 F. Supp. 33 (E.D. Tenn. 1964). Thus, the Government would end up paying only for excess damages not covered by such insurance.

capable of waiver or subject to estoppel. See Best Bearings Co. v. United States, 463 F.2d 1177, 1179 (7th Cir. 1972); Diggers v. United States, 309 F.Supp. 1377, 1379 (D.S.C. 1970). Generally, the doctrines of estoppel are not applicable to the United States Government. See United States v. Ulvedal, 372 F.2d 31 (8th Cir. 1967). Moreover, in this instance, the elements which might conceivably evoke estoppel are missing. It is at least questionable that the postal employee's alleged representations should be considered "misleading." We see no reason why plaintiff should not be held responsible for having knowledge of the law which clearly applies in this case. It is apparent that plaintiff, who has had legal counsel from the outset, was simply unaware of the requirements of the Federal Tort Claims Act. We are satisfied that the doctrine of estoppel should not be applied against the Government in this case.

Plaintiff argues further that the applicable two year statute of limitations (28 U.S.C. § 2401(b)) was tolled by his commencement of this action in state court. Apparently, under plaintiff's theory the claim filing requirement of 28 U.S.C. § 2675(a) is also fulfilled by the commencement of the state court action together with the initial oral discussions of the accident between plaintiff's attorney and the postal inspector.

Plaintiff relies upon the case of Henderson v. United States, 429 F.2d 588 (10th Cir. 1970), which rejected the Government's contention that suit brought in state court against the Government employee did not toll the running of the statute of limitations. However, plaintiff's reliance upon the Henderson case is misplaced because it is apparent that the court in that case was construing the Federal Tort Claims Act statutes as they stood prior to the 1966 amendments.

Unlike the present case, the cause of action in Henderson apparently accrued prior to the effective date of the 1966 amendments to the Federal Tort Claims Act.[2] Therefore, that case would necessarily have been governed by the pre-1966 Federal Tort Claims Act statutes. See Phillips Pipeline Co. v. United States, 299 F. Supp. 768 (W. D. Okla. 1969). We note further that for its conclusion, with respect to 28 U.S.C. § 2401(b), the court in Henderson relied upon cases applying the pre-1966 statutes, and the Henderson decision was silent as to the post-1966 claim filing requirements of 28 U.S.C. § 2675.

The 1966 amendments to the Federal Tort Claims Act effected certain changes which are particularly significant in the case at hand. The former section 2401(b) required only that an "action" be commenced within two years after the claim accrued. As amended, section 2401(b) now requires that a claim be presented "in writing to the appropriate Federal agency" within the two year period. Most significantly, in contrast to the law as amended, former section 2675 did not require prelitigation presentation of a tort claim to an administrative agency. See Meeker v. United States, 435 F.2d 1219, 1222 n. 6 (8th Cir. 1970).

Cases construing the amended Federal Tort Claims Act have consistently held that filing of an administrative claim is an absolute prerequisite to any civil action against the United States for damages arising from the negligence of a federal employee. Melo v. United States, 505 F.2d 1026 (8th Cir. 1974); Best Bearings Co. v. United States, 463 F.2d

2. The facts in Henderson indicate that the claim in that case arose on December 3, 1966, which was prior to the effective date of 28 U.S.C. § 2401(b) and 2675(a), as amended effective January 18, 1967. Section 10 of Pub. L. 89-506 provided that: "This Act [of 1966 amending §§ 2401(b), 2675, and other sections] shall apply to claims accruing six months or more after the date of its enactment [July 18, 1966]."

1177 (7th Cir. 1972); Meeker v. United States, 435 F.2d 1219 (8th Cir. 1970).

The legal requirement of filing an administrative claim is explicit, mandatory, and unambiguous. 28 U.S.C. § 2675; see also 39 C.F.R. §§ 912.1-192.15. The Court of Appeals for the Eighth Circuit has expressly held that "the administrative remedy requirements of § 2675 cannot be circumvented by commencing an action against a Government employee in state court." Melo v. United States, supra at 1029. Plaintiff has failed to show that he has pursued the administrative procedure prerequisite to bringing this suit, and therefore this court lacks subject matter jurisdiction over plaintiff's claim. This alone is enough to require dismissal. Melo v. United States, supra.

Therefore, it is ordered that the motion of the United States under Federal Rule of Civil Procedure 12(b)(1) to dismiss for lack of subject matter jurisdiction is GRANTED.

Dated: August 8, 1975.

Edward J. Devitt

EDWARD J. DEVITT, Chief Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JOHN P. ELTER)
V.) Civil Action No. 74-526
UNITED STATES OF AMERICA)

OPINION AND ORDER GRANTING MOTION TO DISMISS

KNOX, District Judge

Plaintiff John P. Elter filed this action against Marlin LeFever and his wife Martha LeFever on April 25, 1974, in the Court of Common Pleas of Butler County, Pennsylvania to recover damages for personal injuries and property damage allegedly resulting from an automobile accident on May 22, 1970, involving plaintiff and Martha LeFever. Plaintiff alleges that this accident occurred on a secondary country road in Butler County and was caused by Martha LeFever's negligence.

Subsequently, Martha LeFever filed a petition to remove the action to the United States District Court for the Western District of Pennsylvania under Section 2679(d) of Title 28, United States Code. On June 12, 1974, pursuant to a certification by the United States Attorney for the Western District of Pennsylvania that Martha LeFever was a United States Post Office Department employee acting within the scope of her employment at the time of the accident, this court ordered that the United States of America be substituted as defendant in place of Martha LeFever and

that the action proceed as a tort action against the United States under the provisions of 28 U.S.C. 1346(b). On August 7, 1974, this court granted Marlin LeFever's motion to be dropped as a misjoined party under Rule 21 of the Federal Rules of Civil Procedure and ordered that the action continue as John P. Elter v. United States.

The United States now moves to dismiss the complaint under Rule 12(b)(1) of the Federal Rules of Civil Procedure, alleging that the court does not have jurisdiction over the subject matter of the claim because plaintiff failed to file an administrative claim as required under Section 2675(a) of Title 28 U.S.C. Section 2675(a) provides in part:

> "An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. (Emphasis added).

Plaintiff admits failing to file an administrative claim, but alleges that he had no knowledge or reason to know that Martha LeFever was a federal employee acting within the scope of her employment at the time of the accident. Plaintiff argues that under these facts, Section 2675(a) should not apply to bar this suit which reached federal court only after removal of the original state court proceeding.

The question presented is whether filing an administrative claim under Section 2675 is a prerequisite to federal court jurisdiction regardless of plaintiff's knowledge or lack thereof that the original defendant was a federal employee acting within the scope of her employment at the time of the accident. We hold that filing such a claim is a jurisdictional prerequisite.

Analysis of this issue must begin with the basic proposition that as a sovereign, the United States is immune from suit save as it consents, and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit. United States v. Sherwood, 312 US 584, 85 L Ed 1058 (1941). According to the so-called government drivers statute, the exclusive remedy for personal injury or property loss resulting from the operation of a motor vehicle by a federal employee acting within the scope of his employment lies against the United States under Sections 1346(b) and 2672 of 28 USC. 28 U.S.C. 2679(b) Section 2675(a) provides that an action shall not be instituted upon a claim against the United States for damages based on the negligent conduct of a federal employee acting within the scope of his employment unless the claimant shall first have presented the claim to the appropriate federal agency and a final denial is made. The purpose of this requirement to file an administrative claim is to ease court congestion and expedite the fair settlement of tort claims against the United States. See 1966 U.S. Code Cong. & Ad. News 2515-20.

The United States Court of Appeals for the Third Circuit has held that the Section 2675(a) administrative claim requirement is jurisdictional and cannot be waived. Bialowas v. United States, 443 F 2d 1047 (3d cir 1971). In Driggers v. United States, a case cited by the Third Circuit in Bialowas, the district court stated that even where suit is filed against an individual whose status as a federal employee acting within the scope of his employment is not clearly known to plaintiff, an administrative claim must precede an action under the Federal Tort Claims Act. 309 FS 1377, (D.S.C. 1970).

Plaintiff's argument that he had no knowledge or reason to know that Martha LeFever was a federal employee acting within the scope of her employment at the time of the accident appears to relate more to the requirements of 28 U.S.C. 2401(b). That section provides in part that a tort claim against the United States shall be forever barred unless it is presented to the appropriate federal agency within two years after such claim accrues. In medical malpractice cases brought under the Federal Tort Claims Act, federal courts have held that federal law, not state law, determines the time at which a claim accrues, and that such claim accrues when the claimant discovered or in the exercise of reasonable diligence should have discovered the existence of the acts constituting malpractice. See Brown v. United States, 353 F 2d 578 (9th cir 1965); Quinton v. United States, 304 F 2d 234 (5th cir 1962); Staley v. United States, 306 FS 521 (M.D.Pa. 1969.) This court, however, has failed to find any case law to support the proposition that the two-year filing requirement of Section 2401(b) should be tolled until plaintiff had knowledge or reason to know that Martha LeFever was a federal employee acting within the scope of her employment at the time of the accident. To the contrary, a United States District Court has held that the two-year limitation applied to bar an action under the Federal Tort Claims Act even when the original defendant, as well as the plaintiff, was unaware that he was a federal employee acting within the scope of his employment at the time of the accident in question. Baker v. United States, 341 FS 494 (D.Md. 1972). Finally, it should be noted that there is some evidence to suggest that plaintiff had knowledge or reason to know of

Martha LeFever's status as a rural mail carrier because Mrs. LeFever testified that her station wagon was bearing United States Mail signs at the time of the accident.

ORDER

AND NOW, to wit, September 26, 1974, after consideration of the briefs and arguments of the parties, for reasons set forth in the foregoing opinion,

IT IS ORDERED that the motion of the substituted defendant, the United States of America, to dismiss the complaint for lack of jurisdiction be and the same hereby is granted and the action is dismissed.

William W Knox
United States District Judge

CC:

Donald Gates, Esq.
U.S.Steel Bldg 15219

Henry Barr, Esq.
633 U.S.Courthouse 15219

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JEANETTE GRIX, et al,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

CIVIL ACTION NO. 74-72550

OPINION AND ORDER
GRANTING DEFENDANT'S MOTION TO DISMISS

At a session of said Court, held in the Federal Building, City of Detroit, State of Michigan, County of Wayne, this 14th day of January, 1975.

PRESENT: HONORABLE FRED W. KAESS
CHIEF UNITED STATES DISTRICT JUDGE

This action arises out of an automobile accident which allegedly occurred on March 30, 1972. An original complaint was filed in this Court on March 8, 1974, and subsequently dismissed on defendant's motion on July 26, 1974. The present complaint was filed on October 7, 1974.

Defendant bases its Motion to Dismiss on the provisions of 28 U.S.C. §2401(b) which provides in part:

> "A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues . . ."

Plaintiff concedes that no administrative claim was filed until June 5, 1974. Thus, absent any factors tolling the running of the two-year limitation, the time has run, and this Court is without jurisdiction to hear the case.

Plaintiff offers two theories to justify a tolling of the

running of the time limitation. First, the fact that plaintiff was unaware until January 31, 1973, that the driver of the other vehicle was an employee of the United States Government and, second, that the filing of suit on March 8, 1974, tolled the running of the statute.

With regard to the first contention, this Court has found no law which would support it. In a nearly identical case, Baker v. United States, 341 F.Supp. 494 (D. Md. 1972), the Court was confronted with a situation where the Government was not joined as a party until nearly five years after the accident as a result of ignorance of the parties of the possible liability of the Government. In spite of a strong desire to the contrary and the seeming unfairness of the result, the Court was forced to dismiss as the period of limitations had run. Similarly, in Mann v. United States, 399 F.2d 672 (1968), where the plaintiff did not become aware of liability on the part of the Government until six years after an injury, the dismissal of the District Court was affirmed. There the Court indicated:

> "Although exceptions to the applicability of the limitations period might occasionally be desirable, we are not free to enlarge that consent to be sued which the Government, through Congress, has undertaken so carefully to limit." at 673.

Thus, the period of limitations cannot be tolled by the lack of knowledge of the plaintiff of the liability of the Government.

With regard to the second contention, it appears that the filing of suit cannot be deemed a substitute for the claim requirement of 28 U.S.C. §2401(b). In Morano v. U. S. Naval Hospital, 437 F.2d 1009 (1971), in reference to the same statute, the Court noted:

"It will be observed that it is the presenta-

tion of a claim in writing to the appropriate agency, not the filing of a suit, that must be done within two years." at 1010.

Similarly, in Bernard v. U. S. Lines, Inc., 475 F.2d 1135 (1973), where plaintiff brought suit against the Government as a third party defendant, but failed to file a claim with the proper Federal agency, the Court held:

> "While Bernard filed his suit within two years of the accident, his failure to file an administrative claim within the statutory period bars his action." at 1136.

The filing of a proper claim thus becomes a condition precedent to the maintenance of suit against the Government. To find that filing suit tolled the period of limitations would abrogate the purpose and intent of the statute and make the claim requirement meaningless.

While this Court is sensitive to the apparent inequity of this result, the case must be dismissed.

THEREFORE, IT IS ORDERED that defendant's Motion to Dismiss is hereby granted.

CHIEF UNITED STATES DISTRICT JUDGE

A TRUE COPY
HENRY R. HANSSEN, Clerk
BY _____ DEPUTY CLERK

DOJ-1977-03